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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 394

JOHN S. FUNK, PETITIONER AND APPELLANT BELOW,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

This is a criminal prosecution brought in the District Court of the United States for the Middle District of North

Carolina by the respondent herein against John S. Funk, petitioner herein, by means of an indictment returned at Rockingham, N. C., at the September, 1929, term of said court which indictment charged the petitioner Funk along with others with the crime of conspiracy to violate the National Prohibition Act (R. 1).

The petitioner, a Federal Prohibition Agent, was charged along with one Gus Dowdy with conspiring with said Dowdy and one Charlie Martin to violate the National Prohibition Act (R. 2). The conspiracy is alleged to have been formed on or about July 5, 1928 (R. 2). The conspiracy is fully described, it being alleged that Dowdy and Martin should manufacture, transport, etc., intoxicating liquors and that Funk, in his capacity as an officer should aid and abet them by giving them information and protection against detection and arrest (R. 2-3).

The proof of the conspiracy comes almost entirely from the evidence of Charlie Martin (R. 9-12). That evidence fails to disclose any conspiracy in which Dowdy participated (R. 9-12). The conspiracy proved by Martin began after September 28, 1928 (R. 9). It did not involve any aiding and abetting by Funk of violations of the Federal Prohibition Law. It was confined to corrupt efforts to relieve offenders of prosecution after they had been caught (R. 9-12). In one case only did Funk give any advance information in an effort to protect Martin or others (R. 10-11). A motion to direct a verdict for the defendant was made at the conclusion of the Government's case (R. 29) and was renewed at the close of the case (R. 45). Proper exceptions were taken.

Prior to the formation of the conspiracy as proved Martin testified that he paid Funk $200 to suppress a prosecution against his wife and his wife's sister. This occurred at Roanoke, Virginia (R. 7-9). Over the petitioner's objec-

tion a witness Buckner, who went with Martin to Roanoke, was permitted to testify as to what Martin told him about the purpose of this trip, as follows: "He told me he was going up there to try to get a liquor case smothered out—said he was going to pay Funk money to get him to smother it out" (R. 25).

During the course of the trial Martin testified to acts and conversations in the presence of Mrs. Funk, wife of the defendant, and telephone conversations with her that were highly incriminating (R. 10, 12, 15, 16). At the close of the Government's case petitioner offered his wife as a witness. Upon objection by the Government she was not permitted to testify, nor was she permitted to state for the record what her testimony would be, and proper exceptions were taken by the defendant (R. 29).

The trial was by jury and a verdict (R. 45) and judgment was rendered in favor of the respondent, finding the petitioner Funk guilty and sentencing him to imprisonment for one year and one day in the Federal Pentitentiary at Atlanta, Georgia (R. 54, 64). An appeal from said judgment was taken by said petitioner to the United States Circuit Court of Appeals for the Fourth Circuit, which affirmed the judgment of the District Court (R. 70). The principal questions involved in said appeal were:

(*a*) Was the wife of the petitioner a competent witness in his behalf?

(*b*) Was the evidence of the witness Buckner introduced on behalf of the Government admissible as against the petitioner?

(*c*) Was there a fatal variance between the allegations of the indictment and the proof in the case in violation of the petitioner's rights under the 5th and 6th Amendments to the Constitution of the United States?

which questions were decided by the said United States Circuit Court of Appeals adverse to the contention of the petitioner and these decisions materially affected the determination of said appeal.

II.

Reasons Relied on for Allowance of the Writ.

1. The decision of said circuit court of appeals as to the competency of the petitioner's wife as a witness for him by holding that she was not competent, is in conflict with a decision of the Circuit Court of Appeals for the Ninth Circuit on the same matter in the case of *Rendleman* v. *United States* (1927), 18 Fed. (2d) 27; and is also in conflict with a decision of the Circuit Court of Appeals for the Ninth Circuit on the same matter in the case of *Green* v. *United States* (1927), 19 Fed. (2d) 850; and is also in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit on the same matter in the case of *Tinsley* v. *United States* (1930), 43 Fed. (2d) 891.

2. The decision of the said Circuit Court of Appeals as to the competency of the petitioner's wife as a witness for him by holding that she was not competent involves an important question of Federal law which has not been, but should be, settled by this Court.

3. The decision of the said Circuit Court of Appeals as to the competency of the petitioner's wife as a witness for him by holding that she was not competent is a decision of a Federal question probably in conflict with applicable decisions of this Court.

4. The great importance of certainty in the administration of justice by the inferior Federal courts, particularly with reference to the competency of a wife as a witness in behalf of her husband, when such husband is being tried

for a crime; the innumerable occasions upon which evidence of such a wife would be material and important in behalf of her husband if she be competent; and the need of an authoritative and elucidating decision on the question.

5. The decision of the said Circuit Court of Appeals as to the admissibility of the evidence of the witness Buckner by holding that it was admissible involves an important question of Federal law which has not been, but which should be, settled by this Court.

6. The decision of the said Circuit Court of Appeals as to the question of variance between the allegations of the indictment and the proof by holding that there was no material variance is an erroneous decision of an important question of general law.

7. The decision of the said Circuit Court of Appeals as to the question of variance between the allegations of the indictment and the proof by holding that there was no material variance involved an important question of Federal law which has not been, but which should be, settled by this Court.

8. The decision of the said Circuit Court of Appeals as to the question of variance between the allegations of the indictment and the proof by holding that there was no material variance is a decision of a Federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals had in the case numbered and entitled on its docket

"No. 3517, John S. Funk, appellant, *v.* United States of America, appellee," to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals be reversed by the Court and for such further relief as to this Court may seem proper.

Dated August 28th, 1933.

JOHN S. FUNK,
By CHAS. A. HAMMER,
JOHN W. CARTER,
ALLAN S. ADAMS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]

No. 394

JOHN S. FUNK, PETITIONER AND APPELLANT BELOW,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT AND APPELLEE BELOW.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

The opinion in the United States Circuit Court of Appeals is reported in — Federal (2d) —.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is the 3rd day of July, 1933, as appears from page 70 of the record.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28, U. S. C. A., Section 347.

3. On a trial of an indictment charging the petitioner with conspiracy

(*a*) formed on or about July 5, 1928 (R. 2);
(*b*) with Martin and Dowdy (R. 2);
(*c*) to violate the National Prohibition Act (R. 2);
(*d*) by using his official position to aid and abet in the manufacture, transportation, etc., of intoxicating liquors (R. 2);

the government proved a conspiracy

(*a*) formed subsequent to September 28, 1928 (R. 9);
(*b*) with Martin only (R. 9-12);
(*c*) to corruptly influence prosecutions already begun (R. 9-12);
(*d*) and not to aid and abet in any positive violations of the National Prohibition Act as and when committed (R. 9-12).

But a motion to direct a verdict for the defendant was denied (R. 29, 45).

A witness Buckner was permitted to testify to statements of Martin made to Buckner prior to the formation of the conspiracy and not in pursuance thereof (R. 24-25).

The wife of the petitioner was held to be incompetent as a witness for him, although the Government had shown frequent instances of where she had knowledge of highly incriminating facts if the Government's evidence was true (R. 10, 12, 15, 16).

4. The cases believed to sustain said jurisdiction are as follows:

Magnum Import Co. v. *Coty*, 262 U. S. 159;
Southern Power Co. v. *North Carolina Public Service Co.*, 263 U. S. 508;
Keller v. *Adams-Campbell Co.*, 264 U. S. 314;

Layne & Bowler Corp. v. *Western Well Works*, 261 U. S. 387;

Webster Electric Co. v. *Splitdorf Electric Co.*, 264 U. S. 463.

III.

Statement of the Case.

This has already been stated in the preceding petition under I, which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The United States Circuit Court of Appeals erred in holding that the wife of the petitioner was an incompetent witness in his behalf.

2. The United States Circuit Court of Appeals erred in holding that the evidence of the witness Buckner was admissible as against the petitioner.

3. The United States Circuit Court of Appeals erred in holding that there was no fatal variance between the indictment and the proof.

V.

ARGUMENT.

Summary of the Argument.

Point A.—The wife of a defendant charged with crime in the Federal courts is a competent witness for her husband.

Point B.—1. Evidence of statements made by an alleged co-conspirator to a third party are not admissible unless made during the existence of the conspiracy and in furtherance of it.

2. Such evidence is not admissible for purposes of corroboration unless admitted for that purpose only and not as substantive and supporting testimony.

Point C.—If an indictment describes a conspiracy by naming the time of its formation, the parties thereto as well as the method by which it was to be effected, proof of a conspiracy formed at a different time, with different parties and for a different purpose will not support such an indictment. In such case there is a fatal variance between the allegations and proof and a failure to direct a verdict for the defendant upon proper motion is a denial of the defendant's constitutional rights under the 5th and 6th Amendments to the Constitution of the United States.

Point A.

The wife of a defendant charged with crime in the Federal courts is a competent witness for her husband.

This question is conceived to be the question of greatest importance in this case. It is of high moment because the many Federal district courts are from day to day trying many defendants whose interests are vitally affected by a proper decision of this interesting question. This is particularly true inasmuch as many of these inferior courts are assuming that the question has been definitely settled by decisions of this Court. So far as our research can determine there is not a single inferior Federal court whose decisions have been reported that has ever attempted to defend the rule that a wife is incompetent as a witness on behalf of her defendant husband by argument or reason. They all content themselves with relying upon the citation of several cases decided by this Court, sometimes adding that the matter is no longer one for discussion. In the light

of these decisions it is astonishing to learn that this Court has never discussed the reasons for such a rule nor supported it by any reasoning or substantial authority.

Cases In This Court.

The first case in which the Supreme Court ever approached the subject was that of *Graves* v. *United States* (Nov. 6, 1893), 150 U. S. 118, 121; 37 L. Ed. 1021; 14 S. C. R. 40. The wife was not offered as a witness. She was not present at the trial. During the course of the argument the District Attorney was permitted to comment upon her absence and to suggest that she ought to have been present, in order that witnesses for the Government might identify her as the woman seen with the defendant on certain occasions. In an opinion by Mr. Justice Brown this Court held that such argument was improper because the wife was not a competent witness either in behalf of or against her husband, and therefore there was no obligation or duty upon him to have her present. No authority is cited for the proposition that the wife would have been incompetent. No reason is given for such a rule.

In *Hendrix* v. *United States* (Jan. 3, 1911), 219 U. S. 79; 55 L. Ed. 102; 31 S. C. R. 193, this Court was for the first time confronted with the direct proposition of whether a wife was competent as a witness for her husband in a criminal prosecution for an offense against the United States. The case was tried in the Eastern District of Texas, which court excluded the evidence. The point is disposed of in the following language:

> "It is assigned as error that the wife of Hendrix was not allowed to testify in his behalf to certain matters which, it is contended, were 'vitally material to his defense.' The ruling was not error. *Logan* v. *United States*, 144 U. S. 263; 36 L. Ed. 429; 12 S. C. R. 617." Page 91.

There is not another word of discussion on the subject and no other authorities cited.

In *Jin Fuey Moy* v. *United States* (Dec. 6, 1920), 254 U. S. 189; 65 L. Ed. 214; 41 S. C. R. 98, the direct question came for the second and last time to this Court. The case had been tried in the Western District of Pennsylvania and the trial is reported in 253 Fed. 213. If that opinion is to be relied upon the question of the wife's competency as a witness for her husband was not there raised. In the resume of the argument for the petitioner appearing in Law Edition Reports (pp. 215-217) there is no reference to any contention that the wife was competent. The commentator in the Law Edition Reports (p. 214), after referring to the rule of *Hendrix* v. *United States, supra,* makes the following observation:

> "And it will be observed that this rule (that the wife is incompetent in behalf of her husband) is conceded in *Jin Fuey Moy* v. *United States, the actual decision being that the rule applies although her evidence is offered simply to contradict the testimony of particular witnesses for the government* who testified to certain matters as having happened in her presence."

We think it worth while to quote in its entirety that portion of the opinion which deals with the subject. This opinion was delivered by Mr. Justice Pitney, as follows:

> "But a single point remains—hardly requiring mention—the refusal to permit defendant's wife to testify in his behalf. It is conceded that she was not a competent witness for all purposes, a wife's evidence not having been admissible at the time of the first Judiciary Act (Sept. 24, 1789, 1 Stat. at L. 73, chap. 20), and the relaxation of the rule in this regard by 858, U. S. Rev. Stat., Comp. Stat. 1464, 9 Fed. Stat. Anno. 2d Ed. p. 1421, being confined to civil actions. *Logan* v. *United States,* 144 U. S. 263, 299-302, 36 L. Ed. 429, 441-443, 12 Sup. Ct. Rep. 617; *Hendrix* v. *United*

States, 219 U. S. 79, 91, 55 L. Ed. 102, 106, 31 Sup. Ct. Rep. 193. But, it is said, the general rule does not apply to exclude the wife's evidence in the present case, because she was offered not 'in behalf of her husband,' that is, not to prove his innocence, but simply to contradict the testimony of particular witnesses for the government who had testified to certain matters as having transpired in her presence. The distinction is without substance. The rule that excludes a wife from testifying for her husband is based upon her interest in the event, and applies irrespective of the kind of testimony she might give."

So far as we can determine no other case has been decided by this Court in which the direct point was in issue. The only authorities cited in any one of the three cases is that of *Logan* v. *United States, supra.*

We have not overlooked the fact that this Court has held that the wife is not a competent witness in a criminal prosecution in the Federal courts against her husband. *Miles* v. *United States* (April 4, 1881), 103 U. S. 304; 26 L. Ed. 481; *Bassett* v. *United States* (Dec. 22, 1890), 137 U. S. 496; 34 L. Ed. 762; 11 S. C. R. 165.

We are also advised that in civil cases the Court has held that a wife is not a competent witness for her husband. *Lucas* v. *Brooks* (Dec. 1, 1873), 18 Wall. 463; 21 L. Ed. 779. Nor is she a competent witness against the interest of her husband in such cases. *Stein* v. *Bowman* (1839), 13 Pet. 207; 10 L. Ed. 129; *Stickney* v. *Stickney* (May 3, 1889), 131 U. S. 227; 33 L. Ed. 136; 9 S. C. R. 677; *Hopkins* v. *Grimshaw* (Feb. 15, 1897), 165 U. S. 342; 41 L. Ed. 739; 17 S. C. R. 401. But as we see it these cases decide entirely different questions from that here presented and the decisions rest upon quite different reasons from any which may be urged in behalf of a rule that would make a wife incompetent for her husband in a criminal prosecution.

If the three cases, *Graves* v. *United States; Hendrix* v. *United States;* and *Jin Fuey Moy* v. *United States,* constitute the entire direct authority from this Court holding that a wife is incompetent for her husband in the present case, we submit that the reason for such a rule cannot be found within the reported cases which established it and that one must look beyond these decisions and particularly to *Logan* v. *United States, supra,* to ascertain the reasons controlling this Court in establishing a rule of evidence which, in the light of modern and enlightened thought, is repugnant to the principles governing the administration of justice in every one of the forty-eight States and in every English speaking jurisdiction in the world, except alone the Federal courts of this Government.

By an examination of the case of *Logan* v. *United States, supra,* we are able by inference at least to ascertain the probable source of the rule so imperfectly and scantily stated in *Hendrix* v. *United States, supra;* and *Jin Fuey Moy* v. *United States, supra.*

In 1851 *United States* v. *Reid,* 12 How. 361; 13 L. Ed. 1023, was decided by this Court. Reid and Clements were jointly indicted in the Circuit Court for the Eastern District of Virginia for murder. They were separately tried and upon Reid's trial he attempted to call Clements as a witness in his behalf. The court refused to permit him to do so, holding that as the witness was jointly indicted with the defendant he was not competent.

By a Virginia statute of 1849 the witness would have been competent. The contention of defendant was that Section 34 of the Judiciary Act of 1789 declaring, "That the laws of the several States * * * shall be regarded as rules of decision in trials at common law in the courts of the United States," made the Virginia statute applicable to the trial.

In an opinion by Mr. Chief Justice Taney, the Court held that the language of Section 34 applied only to civil cases at common law, saying in this connection:

> "But it could not be supposed, without very plain words to show it, that Congress intended to give to the States the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another. * * * Neither could the Court look altogether to the rules of the English common law, as it existed at the time of the settlement of this country * * * nor is there any Act of Congress prescribing in express words the rule by which the courts of the United States are to be governed, in the admission of testimony in criminal cases. But we think it may be found with sufficient certainty, not, indeed, in direct terms, but by necessary implication, in the Acts of 1789 and 1790, establishing the courts of the United States, and providing for the punishment of certain offenses. And the law by which, in the opinion of this Court, the admissibility of testimony in criminal cases must be determined, is the law of the State, as it was when the courts of the United States were established by the Judiciary Act of 1789." Page 363.

There follows considerable discussion of the purpose of the people of the United States to adopt the principles of the English common law. Attention is then directed to Section 20 of the Judiciary Act of 1789 and Section 29 of the Crimes Act of 1790 (it has been said that this latter section had been repealed in 1840. 43 Harvard Law Review, 556). These two sections refer to the matter of procedure in criminal and civil cases. The Court then adds:

> "But neither of these Acts make any express provision concerning the mode of conducting the trial after the jury are sworn. They do not prescribe any

rule by which it is to be conducted, nor the testimony by which the guilt or innocence of the party is to be determined. Yet, as the courts of the United States were then organized, and clothed with jurisdiction in criminal cases, it is obvious that some certain and established rule upon this subject was necessary to enable the courts to administer the criminal jurisprudence of the United States. And it is equally obvious that it must have been the intention of Congress to refer them to some known and established rule, which was supposed to be so familiar and well understood in the trial by jury that legislation upon the subject would be deemed superfluous. This is necessarily to be implied from what these Acts of Congress omit, as well as from what they contain.

"But this could not be the common law as it existed at the time of the emigration of the colonists, for the Constitution had carefully abrogated one of its most important provisions in relation to testimony which the accused might offer. It could not be the rule which at that time prevailed in England, for England was then a foreign country, and her laws foreign laws. And the only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of Congress, was that which was then in force in the respective States, and which they were accustomed to see in daily and familiar practice in the State courts. And this view of the subject is confirmed by the provisions of the Act of 1789, which refers its courts and officers to the laws of the respective States for the qualifications of jurors, and the mode of selecting them. And as the courts of the United States were in these respects to be governed by the laws of the several States, it would seem necessarily to follow that the same principles were to prevail throughout the trial; and that they were to be governed in like manner, in the ulterior proceedings after the jury was sworn, where there was no law of Congress to the contrary." Pages 365-366.

The conclusion of the opinion is stated as follows:

> "But the rules of evidence in criminal cases, are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed. Congress may certainly change it whenever they think proper, within the limits prescribed by the Constitution. But no law of a state made since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases; and the testimony of Clements was therefore properly rejected, and furnishes no ground for a new trial." Page 366.

We direct attention to the fact that nothing in the opinion suggests a variation from the rule of 1789 in States admitted to the Union after that date, although at the time of the decision there were a number of such States.

Forty years later *Logan* v. *United States* (April 4, 1892), 144 U. S. 263; 36 L. Ed. 429; 12 S. C. R. 617, came before this Court for decision. Logan along with other defendants was tried for conspiracy in the Circuit Court for the Northern District of Texas.

Martin and Spear were offered as witnesses by the Government. Martin had been convicted in the courts of North Carolina of a felony; Spear had been convicted in the courts of Texas of a felony, but Spear had been pardoned by the governor of Texas prior to the trial. There was objection by the defendants upon the ground that both witnesses were incompetent.

The plaintiff in error relied on a Texas statute of 1879 making felons incompetent as witnesses in that State.

An Act of Congress of the Republic of Texas in 1836 adopted the common law of England to be followed and practiced by the courts of the Republic of Texas and that act was in force when Texas was admitted to the Union in 1845.

Following the reasoning of *United States* v. *Reid, supra,* in an opinion by Mr. Justice Gray, the Court held:

> "The competency of witnesses in criminal trials in the courts of the United States held within the State of Texas is not governed by a statute of the state which was first enacted in 1858, but except so far as Congress has made specific provisions upon the subject, is governed by the common law, which, as has been seen, was the law of Texas before the passage of that statute and at the time of the admission of Texas into the Union as a state." Page 303.

Although the reasoning of the Reid case was approved and apparently followed, the Court avoided the result which at first blush would have been expected. It was becoming apparent that a rule which was regarded in 1851 as being sound was now coming to be looked upon as a medieval technicality and this Court, as well as the inferior Federal courts (as we shall presently show), began to find all sorts of reasons for permitting witnesses to testify rather than to hold them incompetent. It was held that the courts of North Carolina were courts of a foreign jurisdiction so far as the Federal courts of Texas were concerned and that conviction of felony in a foreign jurisdiction would not operate to prevent such a felon from testifying. Of course the State courts of Texas, in which Spear was convicted, were just as foreign to the jurisdiction of the Federal courts of Texas as were the State courts of North Carolina. But this was not referred to in the opinion. Spear was held competent because he had been pardoned by the Governor of Texas (who, of course, was the governor of a foreign State), and this removed his disqualification.

It is also true that this opinion, and particularly that part which we have quoted, has been taken as authority for the proposition that the common law of 1789 controls

in such matters only in the States which were a part of the United States as of 1789, and that as to States subsequently admitted the rule should be according to the common law of such State at the time of its admission to the Union. The language of the opinion does not directly sustain such a proposition, but it has now become more or less generally accepted by the respective circuit courts of appeal. *Withaup* v. *United States* (C. C. A., Eighth Circuit, Dec. 29, 1913), 127 Fed. 530; *McCoy* v. *United States* (C. C. A., Fifth Circuit, Jan. 12, 1918), 247 Fed. 861; *Louie Ding* v. *United States* (C. C. A., Ninth Circuit, Jan. 7, 1918), 247 Fed. 12. It has been suggested, however, that *Olmstead* v. *United States* (June 4, 1928), 277 U. S. 438, 466, 72 L. Ed. 944, 48 S. C. R. 564, has by inference shaken this rule and made the common law of 1789 applicable throughout the Union.

Benson v. *United States* (Dec. 5, 1892), 146 U. S. 325, 36 L. Ed. 991, 13 S. C. R. 60, next presented a like question to this Court. In a trial had in the District of Kansas the wife of the defendant testified against him. There was, however, no objection to her testimony and there was some question as to the timeliness of the motion to strike it out. For these reasons the Court held that there was no error in this respect. The importance of the case is for a different reason.

An accomplice jointly indicted with defendant, but not tried jointly (her case not having been disposed of at the time of defendant's trial), was examined as a witness for the Government. The Court first apparently discusses the question *in the light of the general common law* and seems to reach the conclusion that the sounder view is that at common law a co-defendant was competent for the Government, but not for the defendant. *There is not a particle of discussion as to the rule under the common law of Kansas at the time of its admission.*

The attention of the Court was directed to the fact that *United States* v. *Reid, supra,* had held that a co-defendant was not competent in behalf of his accomplice on trial. With reference to the Reid case the court, in an opinion by Mr. Justice Brewer, says:

> "It was assumed both in this court and in the circuit court (3 Hughes, 509, 539, 540) that by that law the co-defendant was incompetent. It was not affirmed that such was the rule in the mother country or in the other states of the Union. *We do not feel ourselves, therefore, precluded by that case from examining this question in the light of general authority and sound reason.*" Page 335.

Reference is made to the reasons for the common-law rule, to wit: 1st, that the witness was interested, and 2nd, that he was a party to the record. Fear of perjury was the reason for the rule. The Court comments as follows:

> "Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors. *But the last fifty years have wrought a great change in these respects, and today the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction.* • • • His competency being thus established, the limits of examination are those which apply to all other witnesses. Legislation of similar import prevails in most of the states. *The spirit of this legislation has controlled the decisions of the courts, and steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been*

removed, till now it is generally, though perhaps not universally, true that no one is excluded therefrom unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence.

"In the light of these authorities and this legislation of Congress, there is less difficulty in disposing of this question. *If interest and being party to the record do not exclude a defendant on trial from the witness stand, upon what reasoning can a co-defendant, not on trial, be adjudged incompetent?* The conviction or acquittal of the former does not determine the guilt or innocence of the latter, and the judgment for or against the former will be no evidence on the subsequent trial of the latter. Indeed, so far as actual legal interest is concerned, it is a matter of no moment to the latter. While the co-defendant not on trial is a party to the record, yet he is only technically so. Confessedly, if separately indicted, he would be a competent witness for the government; but a separate trial under a joint indictment makes in fact as independent a proceeding as a trial on a separate indictment. In view of this, very pertinent is the observation of Chief Justice Beasley, in *State* v. *Brien*, 32 N. J. L. 414: 'The only reason for the rejection of such a witness is, that his own accusation of crime is written on the same piece of paper, instead of on a different piece, with the charge against the culprit whose trial is in progress. It is obvious such a rule could only stand, in any system of rational law, on the basis of uniform precedent and ancient usage. I have discovered no such basis.' We think the testimony of Mrs. Rautzahn was competent, and there was no error in its admission." Pages 336-337.

Thus in 1892 this Court held that the Government might avail itself of the evidence of a co-defendant whose case was still pending. The essential reasons for such a holding, as we understand it, have been set out in the above quotation.

It would seem that if judicial construction can broaden the rules of evidence to the extent of making competent one charged with crime as a co-defendant; if it be important to enlarge the domain of competency and to break down the technical barriers which exclude such witnesses from the stand in such cases, then judicial construction can accomplish the same result as between husband and wife, and is it not equally as important and in the interest of justice and fair play for such authority to be exercised and such barriers removed in cases like the present one? However, nineteen years later when the case of *Hendrix* v. *United States, supra,* came before this Court, either such considerations were not presented to it, or else did not impress it.

On January 7, 1918, there came the decision in *Rosen & Pakkas* v. *United States,* 245 U. S. 467, 62 L. Ed. 406, 38 S. C. R. 148, in which this Court went a long step further than it had in *Benson* v. *United States.* Not content with making a co-defendant not yet convicted of crime a competent witness for the Government, the Court in this case completely destroyed the rule of incompetency as it applied to convicted felons.

We feel warranted in devoting considerable attention to the case. Both defendants were tried in the Eastern District of New York. Upon conviction their appeals were heard separately in the Circuit Court of Appeals for the Second Circuit. *Rosen* v. *United States* (Nov. 14, 1916), 237 F. 810, and *Pakkas* v. *United States* (Feb. 6, 1917), 240 F. 350. One Broder, who had been convicted of the crime of forgery in the courts of the State of New York, was offered as a witness for the government against both defendants. There was objection and the Circuit Court of Appeals passed on the question in both cases. In the Rosen case Circuit Judge Coxe does not attempt to justify the use of the witness by any sort of authority. In fact, the opinion says:

> "We are unable to find an authority exactly in point, but we think the decision in the court below was in accord with the trend of modern opinion." Pages 810–811.

There is no attempt to question the fact that conviction for forgery would have disqualified Broder under the common law as it existed in the State of New York in 1789. There is no attempt to rely upon the theory that the courts of New York State were those of a foreign jurisdiction and that therefore the witness would not be barred by such a conviction. The effort of the majority opinion seems to be to rely upon the fact that, although convicted of felony, Broder was sent to a reformatory rather than to the penitentiary. In other words, that the nature of the punishment inflicted was the test of competency rather than the nature of the crime. We venture to assert that no other decision has ever been based on similar reasoning. The majority opinion concludes with this paragraph:

> "The tendency of modern thought is towards the abolition of the archaic rules which undertook to declare, arbitrarily, who were and who were not entitled to credence as witnesses, and who should be absolutely debarred from taking the stand. All this is changed and now in most enlightened and progressive jurisdictions the tendency is to receive all the testimony bearing upon the issue, irrespective of the character of the witness who gives it. Proof of the commission of a crime discredits a witness but it does not absolutely exclude him from the witness stand." Page 811.

There is absolutely no discussion of the common law rule and its application in Federal courts.

In a dissenting opinion Ward, Chief Justice, insists that the witness Broder was incompetent and cited *United States* v. *Reid, supra,* and *Logan* v. *United States, supra,* as authority for his conclusion. In other words, he held to

the strict common law rule theretofore prevailing on the subject.

In the Pakkas case where the facts were the same there was a different opinion by Circuit Judge Rogers, from which we quote as follows:

> "On the trial of the case Broder, who had pleaded guilty to the offense charged in the indictment, was called as a witness by the prosecution. It appeared that he had been sentenced on January 28, 1914, for more than one year's imprisonment in the Elmira State Reformatory upon a conviction for burglary in the second degree. The record of that conviction was produced in open court and counsel for defendant objected to his testifying on the ground that he had been convicted of an infamous crime. The common law excluded the testimony of a person who had been convicted of such a crime; and as Congress has passed no act changing the rule of the common law as to the competency of witnesses in criminal cases in the courts of the United States except in special instances not including or material to the class of cases to which this belongs, it is urged that the admission of Broder's testimony was plainly error for which the conviction should be set aside. It is too late to raise that question in this court. We passed upon the question in *Rosen* v. *United States*, 237 Fed. 810, decided at this term. In its facts it is similar to this. In that case Judge Coxe said:
>
> " 'The tendency of modern thought is towards the abolition of the archaic rules which undertook to declare arbitrarily who were and who were not entitled to credence as witnesses and who should be absolutely debarred from taking the stand. All this is changed and now in most enlightened and progressive jurisdictions the tendency is to receive all the testimony bearing upon the issue irrespective of the character of the witness who gives it. Proof of the commission of a crime discredits a witness, but it does not absolutely exclude him from the witness stand.'

"To that decision we adhere. In *Brown* v. *United States*, 233 Fed. 353, the question came before the Circuit Court of Appeals in the Sixth Circuit, and that court held that as the federal courts are courts of an entirely different sovereignty and are wholly independent of the states, a conviction of an infamous crime in the state court rendering the person incompetent to testify in the state court does not render him incompetent to testify in the federal courts any more than it would in the courts of a foreign jurisdiction, for the federal courts while following the state laws do not give effect to a conviction by a state court. We are in full accord with that decision and hold that no error was committed in the admission of the testimony of Broder." Pages 354–355.

It will be observed that Judge Rogers conceded that Broder's conviction would have excluded him as a witness at common law. He relies upon the very unsatisfactory opinion of Coxe, C. J., in the Rosen case and upon the theory suggested in the Logan case by this Court, and definitely announced for the first time by the Circuit Court of Appeals for the Sixth Circuit, in *Brown* v. *United States* (May 12, 1916), 233 Fed. 353, that convictions in State courts were convictions in foreign jurisdictions and therefore did not act to make the convict incompetent even in Federal courts sitting in the State whose courts had convicted the felon.

When the case came on to this Court the briefs for the petitioners put great reliance on the dictrine announced in *United States* v. *Reid, supra,* and *Logan* v. *United States, supra.* In the brief filed by the Assistant Attorney General the rule laid down in those cases was attacked. It was stated that the difficulty in applying the rule suggested its unsoundness and that it had never been followed as to any other mode of procedure in criminal cases in the Federal courts after the jury is sworn (62 L. Ed. 407). The Government contended that:

"The matter should be re-examined, in the light of reason and public policy, and the rule in Benson's Case should be adopted; namely, that *all witnesses are competent unless some clear reason of public policy forbids*" (62 L. Ed. 408).

The court said in an opinion by Mr. Justice Clark:

"In the almost twenty years which have elapsed since the decision of the Benson case, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent; with the result that this principal has come to be widely, almost universally, accepted in this country and in Great Britain.

"Since the decision in the Benson case we have significant evidence of the trend of congressional opinion upon this subject in the removal of the disability of witnesses convicted of perjury (Rev. Stat. 5392, Comp. Stat. 1916, 10295, by the enactment of the Federal Criminal Code of 1909 (35 Stat. at L. 1088 321; Comp. Stat. 1916 10165, with this provision omitted and 5392 repealed. This is significant, becaues the disability to testify, of persons convicted of perjury, survived in some jurisdictions much longer than many of the other common-law disabilities, for the reason that the offense concerns direetly the giving of testimony in a court of justice, and conviction of it was accepted as showing a greater disregard for the truth than it was thought should be applied from a conviction of other crime.

"Satisfied as we are that the legislation and the very great weight of judicial authority which have developed

> in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved."

It is, of course, quite apparent that this Court was unwilling to adopt the reasoning of either opinion of the circuit court of appeals. Manifestly it could not approve Judge Coxe's idea that the nature of the punishment rather than the nature of the offense should determine competency or incompetency. It was also unwilling to resort to such hair-splitting technicalities as were involved in a decision to the effect that a witness who had been convicted of infamous crime in the State courts of New York should be competent to testify in a criminal trial in the Federal courts (sitting perhaps in the very city in which the conviction was had), but that another witness convicted of the very same crime in a Federal court (sitting in such a city) should be incompetent to testify as a witness in a Federal prosecution. Evidently this Court could not believe that the ends of justice would be served by such a rule and was unwilling to rest its decision upon any such reason. It, therefore, tore the old common-law rule up by the roots insofar as the competency of a convicted felon was concerned, and in no court in the United States has it ever been since sugested that such a rule now applies.

An examination of the opinion in the Rosen case shows clearly the unwillingness of this Court to be bound hard and fast by the holding of the Reid case and its purpose to follow the Benson case and to determine the question presented in the light of general authority and of sound reason. The opinion seems to approve of the idea that changes may be made in the rules of evidence in Federal

courts by judicial construction as well as by legislation. Reference is had to the universal tendency in this country and in Great Britain to hear the testimony of persons of competent understanding who have knowledge of the facts, leaving the credit and weight of such testimony to be determined by the jury rather than by rejecting witness as incompetent. The court definitely and positively approved of this tendency and says that it proceeds upon sound principle. It is difficult for us to undertsand, if the tendency is sound, why it should be applied to make a convict competent and yet not to be applied to permit husband or wife to testify for each other. Is a convicted felon more likely to tell the truth than a man or woman of good character whose sole fault is that they happen to be the husband or wife of a person charged with a crime? If the dead hand of the common law is no longer to act as a bar to a convict, why should it so act as to a husband or wife? If the Federal courts may, without the aid of congressional legislation, permit a convict to testify, notwithstanding the fact that he was incompetent under the common law rule of 1789, why should not these same courts have the power to do likewise in a case of husband or wife? Congress has made a convicted perjurer a competent witness in Federal courts. Under such circumstances will this Court hold a wife to be incompetent solely because more than eighty years ago in the Reid case the court read into an Act of Congress something admittedly not expressly stated therein and thereby established a precedent, the effect of which is now seen to promote injustice rather than justice.

As has been said by one commentator:

> "The Reid case had anchored the federal criminal courts to antiquity. By 1918, this impediment to otherwise universal progress has become insupportable. Congress showed no sign of being helpful, so the Court resorted to self-help. Prior to the Rosen case the law

had had a high degree of certainty and predictability; but in the trite phrase, it was the certainty of injustice." 43 Harvard Law Review 563.

It may be of interest to point out the view taken of the Rosen case by some of the inferior Federal courts, in cases which are not in point so far as facts are concerned.

In the First Circuit the Circuit Court of Appeals in the case of *Solomon* v. *United States,* 297 F. 82 (Feb. 26, 1924), the tendency to "enlarge the domain of competency" seems to meet with approval, and in *Scaffidi* v. *United States* (Jan. 21, 1930), 37 Fed. (2d) 203, attention is called to the fact that the Reid case has been modified by the Rosen case with the following comment:

> "*By judicial construction* the Rosen case removes the bar which prevented a person previously convicted of a felony from testifying in a criminal action." Page 208.

In the Eighth Circuit in the case of *Neal* v. *United States* (July 14, 1924), 1 Fed. (2d) 637, the court says:

> "It may be under the doctrine of *Rosen* v. *United States* (Citation), that the rules of evidence which prevailed in Oklahoma territory at the time of the admission of Oklahoma into the Union are not to be inflexibly applied in the federal courts of that district, but are *subject to modification from time to time as the trend of judicial authority* and legislative enactment require." Page 639.

In the same circuit court in *Williams* v. *United States* (Nov. 22, 1924) 3 Fed. (2d) 129, attention is directed to the fact that almost universally there has been the removal of the disqualification of witnesses convicted of crimes and upon the authority of the Rosen case it is stated that the disqualification does not exist in the Federal courts.

In the Ninth Circuit in *Fay* v. *United States* (Dec. 5, 1927), 22 Fed. (2d) 740, the Rosen case is cited as authority for the proposition that the common law of England with reference to rules of evidence is not controlling.

In the Tenth Circuit in *Coulston* v. *United States* (June 29, 1931), 51 Fed. (2d) 178, the following statement is made upon the authority of the Rosen case:

> "In criminal cases the competency of witnesses is determined by the common law of the jurisdiction as it existed when the state was admitted into the Union, *subject to such changes as may be brought about by judicial authority* or congressional enactment." Page 181.

In the case of *Great Falls Gas Company* v. *Public Service* Commission (Feb. 4, 1930), 39 Fed. (2d) 176, the District Court of Montana says:

> "Judicial legislation may be inescapable. All courts indulge it not alone by reading into statutes what legislatures did not include, but also by new judges expressly or impliedly reversing old and different attributes as aforesaid, removing ancient landmarks by the latter erected.
>
> "Interesting and instructive illustrations may be cited from even the Supreme Court Reports, sometime by 6-3 or 5-4 decisions. Amongst others is the Rosen case (Citation) reversing the cases and repealing the law of more than one hundred years to legislate competency as witnesses in behalf of convicts though curiously enough the like was refused to husband and wife in Jin Fuey Moy (Citation)." Page 178.

A stickler for hard and fast adherence to precedent might criticise the decision in the Rosen case upon the theory that a substantial and radical change was made in the law by "judicial authority and construction", rather than legislative action as is pointed out in some of the

cases just cited. If true this is not an insuperable objection to the case as authority. Manifestly the Rosen case, along with others, was in the mind of Mr. Justice Brandeis when in a dissenting opinion in *Burnett* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 76 L. Ed. 815, 52 S. C. R. 443, he said:

> "*Stare decisis* is not, like the rule of *res judicata*, a universal, inexorable command. 'The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.' *Hertz* v. *Woodman*, 218 U. S. 205, 212, 54 L. Ed. 1001, 1005, 30 S. C. 621." — 406.

A footnote is added listing a great number of cases in which this Court has overruled its earlier decisions and there is included *Rosen* v. *United States* overruling *United States* v. *Reid*.

Twenty-one days after the Rosen decision this Court decided *Greer* v. *United States* (Jan. 28, 1918), 245 U. S. 559, 62 L. Ed. 469, 38 S. C. R. 209. This case was tried in the Eastern District of Oklahoma and then in the Circuit Court of Appeals for the Eighth Circuit. The question involved was the failure of the court to instruct the jury that the defendant was presumed to be a person of good character. The only matter of interest is found in the opinion by Mr. Justice Holmes, as follows:

> "It is argued that the court was bound by the rules of evidence as they stood in 1789. That those rules would not be conclusive is sufficiently shown by *Rosen* v. *United States, supra*. But it is safe to believe that the supposed presumption is of later date of American origin and comes from overlooking the distinction between this and the presumption of innocence, and from other causes not necessary to detail." Page 561.

The case is cited as showing that *Rosen* v. *United States* has been approved by this Court. However, in passing it might be of interest to point out that it is now generally taken that the rule in Federal courts sitting in Oklahoma would not be that of 1789, but would be the rule there prevailing at the time of Oklahoma's admission to the Union (*Neal* v. *United States*) (C. C. A., Eighth Circuit, July 14, 1924), 1 Fed. (2d) 637. Therefore, it would seem to be of small consequence whether the rule criticised by Mr. Justice Holmes is of later date or of American orgin, unless the Rosen case destroys not only the Rule of 1789 but the rules of local law in States subsequently admitted.

CASES IN THE INFERIOR COURTS.

It is perhaps of some value to refer to the decisions in the inferior Federal courts that touch upon the general rules announced in *Reid* v. *United States, Logan* v. *United States, Benson* v. *United States, Hendrix* v. *United States, Rosen* v. *United States,* and *Jin Fuey Moy* v. *United States.* We refer first to those cases that deal with the competency of convicts.

CONVICTS.

In *Maxey* v. *United States* (C. C. A., Eighth Circuit, July 23, 1913), 207 F. 327, it was held that a witness offered for the Government was incompetent because he had been convicted and sentenced for a felony. The record is not clear as to whether this conviction was in a Federal or a State court, as it stated merely that he was sentenced to "15 months in the penitentiary at Atlanta, Georgia." Assuming, however, that he was convicted in the Federal courts the decision is in line with the doctrine of *United States* v. *Reid, supra,* and *Logan v. United States, supra.* This is the only case that we have been able to find which holds that a witness offered for the Government is incompetent because of a

former conviction of crime. In the other cases decided prior to the Rosen case the courts do not expressly repudiate the rule of *Reid* v. *United States* and *Logan* v. *United States,* but they are ingenious in finding some reason why the rule should not apply.

In *United States* v. *Hall* (W. D. of Pa., Dec. 17, 1892), 53 Fed. 352, the rule of incompetency is approved, but the witness was permitted to testify for the Government because of subsequent pardon.

In *United States* v. *Hughes* (W. D. of Pa., Dec. 17, 1892), 175 Fed. 238, there was a like state of facts and a like finding.

In *United States* v. *Sims,* (N. D. of Ala., Dec. 23, 1907), 161 Fed. 1008, the Government offered a witness who had been convicted in that same court for embezzlement of funds of a national bank and had been sentenced to the Federal penitentiary. The court quotes from *Benson* v. *United States, supra,* as to the modern tendency to enlarge the domain of competency and refers to "This broadening of the lines of judicial construction upon the competency of a witness has been wrought in this country partly by legislation and *partly by judicial construction.*" Page 1011. The witness was held competent because embezzlement was not a crime at common law.

In *Brown* v. *United States* (May 12, 1916), 233 Fed. 353, the Circuit Court of Appeals for the Sixth Circuit had under consideration a case tried in the Middle District of Tennessee. A witness offered for the Government had been convicted of a felony in the State courts of Tennessee and sentenced to five years in the State penitentiary. The order of his conviction concluded as follows:

> "That he be rendered infamous, incompetent as a witness in any court of justice in the state, incapable

of exercising the election franchise, or of holding any office of honor, profit or trust in the state." Page 354.

Under the common law as it prevailed in Tennessee in 1789 the witness would have been incompetent in the courts of that State. Notwithstanding this state of facts the Court sought to avoid the application of the archaic common-law rule of 1789 and succeeded in so doing. It pointed out that the tendency to enlarge the domain of competency was wrought partially by legislation and *partially by judicial construction.* It stated that "steadily one by one mere technical barriers which excluded witnesses from the stand have been removed," and announced its judgment as follows:

> "We conclude that the rule of the Reid case, announced by Chief Justice Taney, applies only to an instance where the witness tendered is under the conviction of a crime *against the United States* of that character, which at common law, as established in 1789, rendered infamous the adjudged guilty, and that the rule does not disqualify a witness who is under but the judgment of a state court." Page 359.

This is the case relied upon by Circuit Judge Rogers in his opinion in the Pakkas case, *supra*, which, as we have pointed out, this Court was unwilling to follow and approve.

In *McCoy* v. *United States* (Jan. 12, 1918, 247 Fed. 861, the Circuit Court of Appeals for the Fifth Circuit had under consideration a conviction in the Southern District of Florida. A witness for the Government had been convicted of a felony in Arkansas. Construing the Reid case and the Logan case, the court says:

> "We thus deduce the rule as expounded in this case (Logan case) and in the Reid case to be that, in the absence of specific legislation by Congress, the rules of evidence in the courts of the United States affecting the competency of witnesses in criminal trials, is the law of the state in which the trial occurs as it existed

when that state became a part of the Union." Page 863.

Inasmuch as the law of Florida at the time of its admission to the Union made competent a person who had been convicted of a crime in a jurisdiction other than that of the State of Florida, the witness was here held to be competent.

While this case was decided five days after the Rosen case, evidently the opinion in the Rosen case was not available to the court and is not relied upon in the majority opinion. There is a dissenting opinion by Circuit Judge Batts, which very strongly attacks the theory that the rule of the Reid case is modified in States admitted to the Union since 1789, by accepting the rule prevailing in such States at the time of their admission. Judge Batts would apply the rule of 1789 as it obtained in the original States to all States of the Union, regardless of when admitted. He argues that any other rule would result in hopeless confusion and diversity of opinion on the point. The other cases on the point are all subsequent to the Rosen case and follow that case without criticism or discussion. They are as follows:

Second Circuit—*Safford* v. *United States* (May 10, 1918), 252 Fed. 471;

Fifth Circuit—*Chapman* v. *United States* (Dec. 25, 1925), 10 Fed. (2d) 124;

Sixth Circuit—*Fisk* v. *United States* (Mch. 17, 1922), 279 Fed. 12;

Seventh Circuit—*Peace* v. *United States* (Dec. 14, 1921), 278 Fed. 180;

Eighth Circuit—*Manuel* v. *United States* (Oct. 14, 1918), 254 Fed. 272;

Eighth Circuit—*Ammerman* v. *United States* (Aug. 23, 1920), 267 Fed. 136;

Eighth Circuit—*Hurwitz* v. *United States* (May 12, 1924), 299 Fed. 449;
Eighth Circuit—*McCormick* v. *United States* (Nov. 13, 1925), 9 Fed. (2d) 237;
Eighth Circuit—*Hagan* v. *United States* (Nov. 28, 1925), 9 Fed. (2d) 562.

We summarize the doctrine of the incompetency of a convict in a Federal criminal trial and its development or rather its deterioration as reflected by the decisions. A convict is incompetent because incompetent under the common law of 1789 (Reid case and Maxey case), but in States admitted since 1789 he is competent if he was competent under the local law of such State when admitted (McCoy case and Withoup case). However, if the conviction be had in a State other than the one in which the Federal court is sitting, such conviction does not make him incompetent (Logan case and McCoy case). Upon further reflection a conviction in the courts of the very State in which the Federal court is sitting does not make him incompetent. The conviction must be in a Federal court for a crime against the United States (Brown case and Pakkas case) and then the convict is only in competent if the conviction was for a crime that the law took cognizance of as making him incompetent 150 years ago (Sims case). Finally the convict is competent in any event (Rosen and Pakkas case).

CO-DEFENDANTS.

On the question of the competency of a co-defendant as a witness for the Government against the defendant on trial, the case of *Wolfson* v. *United States* (C. C. A. Fifth Circuit, April 10, 1900), 101 Fed. 430, holds that the co-defendant was competent. In this case the two defendants, Wolfson and Leefe, were jointly tried. Before the close

of the Government's evidence counsel for Leefe offered him as a witness and he was permitted to testify over Wolfson's objection. Of course, insofar as the common law doctrine of co-defendants is concerned neither *Reid* v. *United States* nor *Benson* v. *United States* authorize such a holding. The court concluded that under the common law rule the witness would have been incompetent. It could not draw the distinction that had been drawn in the Benson case between a co-defendant offered for the Government and one offered for the defendant, because in the case at bar there was a joint trial and the witness was interested in the outcome of the very trial then being had, which was not true in the Benson case. However, the court permitted Leefe to testify on the theory that an act of Congress making a defendant competent as a witness at his request changed the common-law rule. The following comment on the common-law rule is interesting:

> "This statement of the common law is useful as showing the barriers to getting at the facts of a case which modern statutes were intended to remove. Of the wisdom or the want of wisdom of these common law rules we have nothing to say. They have been commended as preventing perjury and securing justice and condemned as stopping the mouths of those who are often the only persons that know the facts of the case. *The trend of the present day is to enlarge and not contract the sources of evidence.*" Page 435.

Husband and Wife.

Cases decided by the inferior Federal courts on the question of the competency of husband and wife are now referred to.

That a wife is not competent to testify against her husband generally is held in the following cases:

United States v. *Jones* (D. of S. C., Oct. 1887), 32 Fed. 569;

United States v. *Gwynne* (E. D. of Pa., Jan. 6, 1914), 209 Fed. 993;

Johnson v. *United States* (C. C. A. Eighth Cir., Mch. 2, 1915), 221 Fed. 250;

Cahan v. *Carr* (C. C. A. Ninth Cir., Feb. 24, 1931), 47 Fed. (2d) 604.

That a wife is competent to testify against her husband in certain cases involving exceptions to the common-law rule, particularly in the case of an offense against her person is shown by the following cases:

United States v. *Rispoli* (E. D. of Pa., June 14, 1911), 189 Fed. 271;

Fifth Circuit—*Denning* v. *United States* (Jan. 14, 1918), 247 Fed. 463;

Ninth Circuit—*Cohen* v. *United States* (May 4, 1914), 214 Fed. 23;

Ninth Circuit—*Pappas* v. *United States* (May 7, 1917), 241 Fed. 665;

Ninth Circuit—*Parker* v. *United States* (Feb. 2, 1925), 3 Fed. (2d) 903;

Ninth Circuit—*Kerr* v. *United States* (Feb. 23, 1926), 11 Fed. (2d) 227.

Wives of co-defendants who have already pleaded guilty are held to be competent as witnesses against the defendants then on trial.

Third Circuit—*Knoell* v. *United States* (Feb. 2, 1917), 239 Fed. 16;

Eighth Circuit—*Astwood* v. *United States* (June 20, 1924), 1 Fed. (2d) 639;

Tenth Circuit—*Parnell and Hays* v. *United States* (Apr. 10, 1933), 64 Fed. (2d) 324.

In one case, *O'Brien* v. *United States* (C. C. A. Eighth Circuit, June 2, 1924, 299 Fed. 568, the court held that the

wife of one defendant was competent to testify in behalf of the other provided her evidence was not in behalf of her husband but in support of a separate defense made by his co-defendant. However, the decision was that there was no error in the case in refusing to permit her to testify because her testimony did not come within the rule stated, but was solely in behalf of her husband. None of these cases, however, seem to us to be in point on the question here involved.

Before the decision of *Jin Fuey Moy* v. *United States, supra,* the Circuit Court of Appeals for the Fifth Circuit held in the case of *Talbott* v. *United States* (Oct. 6, 1913), 208 Fed. 144, that:

> "Under the common law the wife of one co-defendant on trial at the same time cannot be called as a witness for or against any of them." Page 145.

The statement is unsupported by argument or reason, and the only authorities cited are *Lucas* v. *Brooks, supra,* and *Bassett* v. *United States, supra.* No reliance is had on either *Graves* v. *United States, supra,* or *Hendrix* v. *United States, supra.*

Since the decision of Jin Fuey Moy it has been held that a wife is incompetent as a witness to testify on behalf of the co-defendants of her husband, certainly where her testimony is in defense of her husband as well as the co-defendants.

United States v. *Davidson* (E. D. of Pa., Dec. 29, 1922), 285 Fed. 661;

United States v. *Liddy* (E. D. of Pa., Oct. 17, 1924), 2 Fed. (2d) 60;

Sixth Circuit—*Haddad* v. *United States* (Dec. 4, 1923), 294 Fed. 536;

Sixth Circuit—*Israel* v. *United States* (Mch. 3, 1925), 3 Fed. (2d) 743;

Seventh Circuit—*Allen* v. *United States* (Oct. 7, 1924), 4 Fed. (2d) 688.

Most of these cases seem to rely upon the authority of *Jin Fuey Moy* v. *United States*. In none of the cases decided since Jin Fuey Moy is there the slightest effort made to reconcile that case with the case of *Rosen* v. *United States*. In none of them is there any effort made to discuss the common law applicable to the situation either in 1789 or at the time of the admission of any of the respective States. Apparently some of these courts construed Jin Fuey Moy to make a wife incompetent generally in behalf of her husband in Federal courts without reference to what the common law or local rule was.

We come now to decisions of inferior Federal courts holding that a wife is incompetent to testify for her husband in a criminal case. The only one we are able to locate prior to the decision in *Rosen* v. *United States, supra,* is the case of *Wesoky* v. *United States* (C. C. A., Third Circuit, Jan. 11, 1910), 175 Fed. 333. The case was originally tried in the Western District of Pennsylvania. The sole comment on the point at issue is as follows:

> "The wife of the defendant in a federal court is not a competent witness. *Graves* v. *United States, supra.*" Page 335.

This case was decided before the decision in *Hendrix* v. *United States, supra.* The Graves case had cited no authority for its holding and apparently the court did not deem it necessary to discuss the common-law rule.

Adams v. *United States* (C. C. A., Eighth Circuit, April 29, 1919), 259 Fed. 214, was decided after the Rosen case and before the Jin Fuey Moy case. The conviction was had in the Eastern District of Oklahoma. The trial court refused to permit the husband to be sworn as a witness in

behalf of his wife then on trial. It was held that this was not error, the court disposing of the point in the following language:

> "Counsel for defendant thinks it is time the above mentioned rule of the common law is changed, and cites *Rosen* v. *United States* (citation). The Supreme Court can overrule its own decisions, but until overruled they are binding on us." Page 214.

The court evidently was of the opinion that *Rosen* v. *United States* had overruled such prior cases as *United States* v. *Reid, supra,* and *Logan* v. *United States, supra,* but it was unwilling to follow the Rosen case to its logical conclusion and overrule *Graves* v. *United States* and *Hendrix* v. *United States.*

We think it pertinent to also point out that the court did not attempt to state or apply the local law as it existed in Oklahoma at the time of its admission as a State. We think it quite likely that the law of that State upon admission probably made the wife competent for her husband. It has been held by this same court in a subsequent case, *Neal* v. *United States, supra,* that this is the proper rule. Such a doctrine now seems to be generally accepted, beginning with the case of *Withaup* v. *United States, supra.*

This opinion was by a divided court and we feel constrained to set out in full the dissenting opinion of Circuit Judge Stone, as follows:

> "I am compelled to dissent, because I believe error was committed in the exclusion of the husband, who was offered as a witness. The wise public policy, which forbids a husband or wife to testify as to confidential communications, is intended by preserving such confidences from disclosure, to preserve unshattered the sacredness and integrity of the marriage relation, which is so vital to the stability of our civilization. The

thought is that married people should be made safe in their communications to each other by the assurance that neither will be permitted to violate such confidences. *It is essentially and solely for the benefit of the parties involved, and serves no further useful purpose.*

"Where both husband and wife voluntarily waive this confidence and desire the disclosure, not only does the sole basis of the rule, and therefore the rule itself, vanish, but there comes into force the cardinal consideration of presenting to the jury all possible information bearing upon the issues in the case. It may be entirely proper to hold that the preservation of the close marriage relation by strict protection of its confidences is more important than the procurement of conviction by evidence obtained through the rupture of that confidence, so basic in our civilization. I cannot conclude that such a purpose is consummated by closing mouths which both husband and wife wish opened to prove lack of criminality by either. Is the marriage relation or is society benefited by preventing a husband or wife from thus coming to the aid of the other in a time of dire need, and to promote justice?" Page 215.

In *Fitter* v. *United States* (C. C. A., Second Circuit, May 14, 1919), 258 Fed. 567, the court passed on the question of the competency of the wife offered by her husband then on trial. The decision is after the Rosen case and before the Jin Fuey Moy case. The trial court held the wife to be incompetent and the circuit court of appeals refused to reverse the decision. As we construe the opinion, however, it did so with some degree of reluctance. We quote from the opinion by Circuit Judge Rogers, as follows:

"It is also objected that error was committed in excluding the testimony of Fitter's wife who was called to give evidence for the defense. The common law rule made husband and wife incompetent as witnesses for or against each other in either civil or criminal proceedings. In some of the states the disqualification

arising from the relation of husband and wife has been removed by statute, but no statute has been passed on this subject by Congress. In *United States* v. *Reid* (citation) the court held that the competency of witnesses in criminal trials in United States courts must be determined by the rules of evidence which were in force in the respective states when the Judiciary Act of 1789 (Act of Sept. 24, 1789—Sec. 20, 1 Stat. 73) was passed. In *Rosen* v. *United States, supra,* the court concluded that 'The dead hand' of the common law rule of 1789 should no longer be applied to excluding of testimony of convicted felons. *"It may perhaps be said with equal reason that 'the same dead hand' should no longer disqualify husband and wife except as respects confidential communications."*

"If the trial judge had permitted Mrs. Fitter to testify this court would not readily have been inclined to hold that error had been committed. But *this* judgment of conviction certainly cannot be set aside because the court still adhered to the rule of the common law." Pages 576-577.

All of the subsequent cases came after the decision of Jin Fuey Moy. They are as follows:

Fourth Circuit—*Krashowitz* v. *United States* (July 5, 1922), 282 Fed. 599;

Fourth Circuit—*Barton* v. *United States* (Apr. 23, 1928), 25 Fed. (2d) 967;

Fourth Circuit—*Fisher* v. *United States* (May 3, 1929), 32 F. (2d) 602;

Fourth Circuit—*Dowdy and Funk* v. *United States* (Jan. 13, 1921), 46 Fed. (2d) 417;

Seventh Circuit—*Slick* v. *United States* (Sept. 2, 1924), 1 F. (2d) 897;

Ninth Circuit—*Lowe* v. *United States* (Aug. 7, 1922), 282 Fed. 597;

Ninth Circuit—*Fasulo* v. *United States* (Oct. 19, 1925), 7 F. (2d) 961;

Ninth Circuit—*Liberato* v. *United States* (June 21, 1926), 13 Fed. (2d) 564.

In the fourth circuit the Jin Fuey Moy case seems to be taken as controlling, and as we construe them the decisions are to the effect that a wife is incompetent for her husband in any of the Federal courts regardless of where the case may be tried.

In practically every one of these cases no effort is made to determine the common law as it existed in the States where these trials were had.

In *Slick* v. *United States* there is not a single citation of either a United States or Federal case supporting the holding, the only authority relied upon by the Circuit Court of Appeals for the Seventh Circuit being *Graff* v. *People,* 208 Ill. 318, 70 N. E. 299.

In *Lowe* v. *United States* the court merely says that the wife is incompetent, citing Jin Fuey Moy. This conviction was had in the District of Oregon. There is no attempt to discuss or to state what was the law of Oregon in this respect at the time of its admission. We think it likely that at the time the wife was not incompetent for her husband in that jurisdiction.

In *Fasulo* v. *United States,* on the authority of *Jin Fuey Moy* v. *United States,* a wife was held to be incompetent for her husband in the Northern District of California. Again there is no discussion of the common law of California at the time of its admission.

In *Liberato* v. *United States, supra,* it was held in the ninth circuit that the wife of the defendant was not competent as a witness for her husband upon the authority of *Jin Fuey Moy* v. *United States.* This case has been expressly disapproved and overruled by the same court. *Rendleman* v. *United States* (C. C. A. Ninth Circuit, March 21, 1927), 18 Fed. 27, 29.

It appears to us that these courts fail to recognize that the common law rule either of 1789 or of the date of admission controls. They seem to accept the Jin Fuey Moy case as holding generally that wives are incompetent to testify for their husbands in Federal courts anywhere.

One of the circuit courts of appeal, however, has squarely faced the fact that there is inconsistency between the decision in the Rosen case and the decision in the Jin Fuey Moy case as it is being construed by the respective circuit courts of appeal. The question was squarely presented in the ninth circuit in the case of *Rendleman* v. *United States* (Mch. 21, 1927), 18 Fed. (2d) 27. Opinion by Circuit Judge Hunt. Rendleman was tried in the District Court for the Western District of Washington for unlawful possession of morphine, and offered his wife as a witness in his behalf and she was excluded. A review of this ruling was the sole error assigned. The circuit court of appeals, upon the authority of *Louie Ding* v. *United States* (C. C. A. Ninth Circuit, 1918), 227 F. 12, *Withaup* v. *United States* (C. C. A. Eighth Circuit, Dec. 29, 1913), 127 Fed. 530, and *Brown* v. *United States* (C. C. A. Sixth Circuit, May 12, 1916), 233 Fed. 354, held that the test as to the competency of the witness was "what local law obtained at the time of the creation of the state, not what the law was at the time of the Judiciary Act of 1789." Page 27.

Reference is then had to the decision of *Rosen* v. *United States, supra,* which "adopted the modern view of holding the witness (a convict) was competent." Page 28. The court quotes with evident approval the following excerpt from the Rosen case.

> "In the almost twenty years which have elapsed since the decision of the Benson Case, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the

conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent, with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain." Page 28.

Reference is had to *Greer* v. *United States, supra,* which followed the Rosen case. The opinion then discusses the case of *Jin Fuey Moy* v. *United States* in the following language:

"The question of the right of the wife to testify in her husband's behalf was involved in *Jin Fuey Moy* v. *United States* (1920), 254 U. S. 189, 41 S. Ct. 98, 65 L. Ed. 214, upon a review of a conviction in the federal court of Pennsylvania. Regarding the point as hardly requiring mention, the court proceeded upon the concession that the wife was not a competent witness for all purposes; her evidence not having been admissible at the time of the Judiciary Act. For this statement *Logan* v. *United States, supra,* and *Hendrix* v. *United States, supra,* were the only cases cited. The court added: 'But, it is said, the general rule does not apply to exclude the wife's evidence in the present case because she was offered not in behalf of her husband, that is, not to prove his innocence, but simply to contradict the testimony of particular witnesses for the government who had testified to certain matters as having transpired in her presence. The distinction is without substance. The rule that excludes a wife from testifying for her husband is based upon her interest in the event, and applies irrespective of the kind of testimony she might give.'

"No reference was made to the Rosen Case, decided three years previously, although, as we have said, the opinion in the Rosen Case stated the contention that under the common law as administered in New York in

1789 the person called as a witness was incompetent. It seems to us that, if the Jin Fuey Moy Case is general as to all federal criminal trials where a wife is called to testify for her husband, then the principle recognized in *Rosen* v. *United States* has been restricted, and the district court held correctly in the case now before us. On the other hand, if the Jin Fuey Moy Case is applicable only to Pennsylvania, where the wife's evidence was not admissible at the time of the first Judiciary Act, then the rule of the Rosen and Louie Ding Cases obtains, and the lower court was in error.

"Considering the several cases, our judgment is that it was not intended by the Jin Fuey Moy Case to depart from the broader rule laid down in the Rosen decision, where the question was disposed of by overruling the common law practice." Pages 28–29.

Various decisions of circuit courts of appeal are referred to, the court giving particular attention to one of its own prior opinions, as follows:

"In *Liberato* v. *United States* (C. C. A. 1926), 13 F. (2d) 564, defendant was convicted of conspiracy in the District Court of Washington. Upon the trial the wife of defendant was called to testify in defendant's behalf. The record shows that, upon objection of the prosecuting attorney, defendant's counsel conceded that under the general rule she could not testify for or against her husband, but argued that he wished to prove certain physical facts which the wife knew of; thus assuming a position like that taken by defendant in the Jin Fuey Moy Case. The trial court held that she could not testify for or against her husband in any respect. Upon writ of error, this court accepted the admission of counsel and followed the Jin Fuey Moy Case.

"After re-examination of the question, we conclude that the decision in the Ding Case is correct and in accord with the Rosen Case, and that any rulings that we may have made inconsistent therewith must be modified." Page 29.

The judgment was reversed and the cause remanded for a new trial.

Subsequently the same court approved the Rendleman case in *Green* v. *United States* (C. C. A. Ninth Circuit, May 9, 1927), 19 Fed. (2d) 850.

As we see it, the decision in the Rendleman Case is directly at variance with all of the decisions in the Fourth, Seventh and Ninth Circuits, which we have cited as applying the Jin Fuey Moy case without limit and without distinction.

We realize that it may be possible to reconcile this case with the others by assuming that in West Virginia, South Carolina, North Carolina, Illinois, Oregon and California the rules of evidence prevailing under the common law at the time of the adoption of the Judiciary Act of 1789 or at the time of the admission of the States to the Union, as the case may be, might have made a wife incompetent for her husband, whereas the contrary may have been true in the State of Washington. If, however, this be the distinction, we again point out that no one of the courts in the Fourth, Seventh or Ninth Circuits has seen fit to direct attention to what the common law was in these respective States at either of the times mentioned. Moreover, a careful reading of the opinion in *Rendleman* v. *United States* does not disclose what the law was in the State of Washington with reference to the competency of the wife for her husband at the time of admission.

Again we point out that this opinion from the Ninth Circuit seems to take into consideration the thought at least that some courts may have construed the Jin Fuey Moy case as "General as to all Federal criminal trials where a wife is called to testify for her husband." Page 28. We think the decided cases in the other circuits are susceptible of such a construction.

Certainly, it appears to us that this case, taking into consideration the cases decided in the other circuits, leaves the law on this point in a state of confusion. That we are not alone in this view is quite apparent from the opinion of Circuit Judge Kenyon in the case of *Tinsley* v. *United States* (C. C. A. Eighth Circuit, Sept. 26, 1930), 43 Fed. (2d) 390. The comment on the point is perhaps dictum as is frankly stated in the opinion. However, the eminence of the distinguished jurist who wrote the opinion and his clear statement of the difficulties presented to himself and other inferior courts of the United States is so cogent and convincing that we take the liberty of quoting therefrom at great length, as follows:

> "The rule of the common law was that the wife of a defendant could not be a witness in a criminal case for a co-defendant if her testimony would tend directly to her husband's acquittal. 1 Greenleaf on Evidence §§ 334 and 335. The precise question here is the right of the wife of a defendant to testify in favor of a co-defendant in a matter that cannot assist or injure her husband in any way. There was no effort to have her testify in favor of her husband but for a co-defendant. If the ancient rule of the common law as to a wife not being permitted in a criminal case to testify in favor of her husband should be recognized, nevertheless it would be inapplicable to the situation here presented.
>
> "In view of this conclusion it is unnecessary for us to pass on the general question of the wife's competency or incompetency in the federal courts as a witness for her husband under the rules of the common law, or as affected by the statutes of the territory of South Dakota at the time of its admission as a state. See *Olmstead et al.* v. *United States*, 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944, 66 A. L. R. 376. We venture far enough, however, into the confused domain of the incompetency of witnesses under the common law and

the applicability of common-law rules on the subject to present conditions of affairs to suggest that practically all of the common-law disabilities of husband and wife have been swept aside in nearly all the states of the union. In this day and age when a married woman is exercising every civil and political right and when the world is progressing toward a more enlightened administration of justice, *to say that a wife cannot testify in favor of her husband in a criminal case because of some rule of the common law of* 1789, *which should be obsolete, is in the opinion of the writer an absurdity and a relic of legal barbarism which should not longer be recognized.* Such rule does not fit present conditions. Should we enter this field, however, it would be most difficult to harmonize the decision of the United States Supreme Court in *Rosen et al.* v. *United States,* 245 U. S. 467, 38 S. Ct. 148, 150, 62 L. Ed. 406, where the court considered the question of disqualification of a witness who had been convicted of a felony, and said, 'we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here,' and the language of Justice Holmes in *Greer* v. *United States,* 245 U. S. 559, 561, 38 S. Ct. 209, 210, 62 L. Ed. 469, 'It is argued that the Court was bound by the rules of evidence as they stood in 1789. That those rules would not be conclusive is sufficiently shown by *Rosen* v. *United States,* 245 U. S. 467, 38 S. Ct. 148, 62 L. Ed. 406,' with the decision of the Supreme Court in *Jin Fuey Moy* v. *United States,* 254 U. S. 189, 195, 41 S. Ct. 98, 101, 65 L. Ed. 214, where the court said: 'But a single point remains—hardly requiring mention—the refusal to permit defendant's wife to testify in his behalf. It is conceded that she was not a competent witness for all purposes, a wife's evidence not having been admissible at the time of the first Judiciary Act, and the relaxation of the rule in this regard by Sec. 858, Rev. Stat. U. S., being confined to civil actions. *Logan* v. *United States,* 144 U. S. 263, 299-302, 12 S. Ct. 617, 36 L. Ed. 429; *Hendrix* v. *United States,* 219 U. S. 79, 91,

31 S. Ct. 193, 55 L. Ed. 102. But, it is said, the general rule does not apply to exclude the wife's evidence in the present case because she was offered not in behalf of her husband, that is, not to prove his innocence, but simply to contradict the testimony of particular witnesses for the government who had testified to certain matters as having transpired in her presence. The distinction is without substance. The rule that excludes a wife from testifying for her husband is based upon her interest in the event, and applies irrespective of the kind of testimony she might give.' The Rosen Case certainly establishes the doctrine that the courts are not conclusively bound as to competency of witnesses by the rules of the common law as they stood in 1789.

"If the dead hand of the common-law rule of 1789 as to the incompetency of witnesses who had once been convicted of crime should no longer be applied, it is difficult to see why it should be applied in favor of the absurd proposition that a husband or wife cannot testify in favor of one another. It would seem a strange administration of justice that if a wife were the only witness who could show the innocence of her husband when he was accused of some serious crime in the federal court that her mouth must be sealed on account of some ancient doctrine that a wife should not be permitted to testify because of identity of interest or interference with domestic happiness, or for any of the other reasons, which Wigmore in his Law of Evidence, vol. 1, 600 and 601, sets forth and makes light of. He calls the rule a misguided one of the common law. Domestic happiness would seem to be invaded to as great an extent by having a husband executed for murder or sent to the penitentiary, as to have the wife testify to matters which might show his innocence, even though some family transactions were disclosed. * * * Pps. 895-896.

"We have felt justified in venturing slightly into this field because it is apparent that unless Congress passes some act making husband and wife competent to tes-

tify as witnesses for each other in the federal courts or unless the Supreme Court passes on the question in such a way as to harmonize the Rosen and Jin Fuey Moy Cases, *supra*, that many of the federal courts will refuse to follow this antiquated and fossilized rule of the common law, on the theory that if there ever was any reason for the same it has long since ceased to exist. Indeed, the Circuit Court of Appeals of the Ninth Circuit, in *Rendleman* v. *United States*, 18 F. (2d) 27, 28, attempts to distinguish the Jin Fuey Moy Case from the Rosen Case, on the theory that the Jin Fuey Moy Case is applicable only to Pennsylvania, 'where the wife's evidence was not admissible at the time of the first Judiciary Act,' and 'that it was not intended by the Jin Fuey Moy Case to depart from the broader rule laid down in the Rosen decision, where the question was disposed of by overruling the common law practice.' The court in the Rendleman Case holds in accordance with the general doctrine of the Rosen Case, refusing to be governed by the rule of the common law that a wife was not a competent witness in behalf of the husband." P. 897.

The opinion then quotes Mr. Leach, 43 Harvard Law Review, 565, as follows:

"Where are we now? An attempt to reconcile a line of authorities in which some later cases have been decided without reference to or apparent thought of earlier ones is probably futile mental gymnastics. It may be suggested, however, that the law of the respective states as of 1789 (*United States* v. *Reid*), or the date of admission of the State (*Logan* v. *United States*, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429), is applicable in the Federal criminal courts except so far as state legislation or judicial decisions have established a weight of authority in favor of a more modern view (*Rosen* v. *United States*). *Jin Fuey Moy* v. *United States can only be explained as an oversight with regard to a minor point in the case, or as an acceptance by the court of an improvident concession of counsel.*

"With good reason the lower federal courts confess their perplexity. Faced with the patent inconsistency of the Rosen and Jin Fuey Moy Cases, most of them take the easiest path by ruling that the latter decision establishes a uniform federal rule that the wife of a criminal defendant is not competent in his behalf, and that the former establishes a uniform federal rule admitting convicted felons. These courts habitally fail to refer to the law of the state in which the court was sitting in 1789 or at the time of the admission of the state into the Union. So far as these cases exclude the wife as a witness in states which prior to admission had passed statutes qualifying the wife as a witness, an erroneous result seems to have been reached. At least one court seems to think that the Reid and Logan Cases are still in full force. And some apply their view of the general weight of common-law authority without reference to any particular state. An examination of cases cited in the footnotes of this paragraph will indicate that at least one circuit court of appeals has assumed three inconsistent positions on this matter in the course of 10 years." P. 897.

As we see it Judge Kenyon has written for us a brief on the question that clearly shows the necessity at least for the granting of a writ of certiorari in this cause and a clarification and reconciliation of the opinions in the Rosen case and the Jin Fuey Moy case. When one of the Circuit Judges of the United States and a distinguished law-writer in one of the leading legal periodicals of the country confess to such bewilderment, as have Judge Kenyon and Mr. Leach, in connection with a question of law so often presented to trial courts by virtue of the very necessity of occasions which are constantly arising, it seems to us to admit of no argument that there is a real and urgent and vital need for a definite and positive statement from this Court that will no longer leave in doubt what rule should be applied as to the competency of a wife for

her husband in any one of the circuits or in any one of the district courts established by Congress.

In seeking to have this Court decide that the wife in the present case was a competent witness for her husband, we realize that we will be met with two objections.

1. This Court has no power to change the rules of law.

2. If this Court has done so in the Rosen case that merely weakens the weight of the Rosen case as authority and furnishes no excuse for a further exercise of an unwarranted power.

We wish to point out that the rule relied upon to make the wife incompetent first announced in the Reid case more than 80 years ago, was not the creation of the Federal courts. It was established by the ancient usage of England and announced by the English and early American courts. In the Reid case this Court did not adopt the rule of its own volition as being a wise and salutary rule of law. It merely determined that Congress by the Judiciary Act of 1789 had adopted the rule for the Federal courts. It admitted that it thus construed the Act of Congress by implication rather than by the express words or direct terms of the statute. Presumably it construed the act in accordance with its view of the intent and purpose of the Congress. Perhaps in the light of conditions then existing that intent seemed clear. It is now manifest that the application of the rule of the Reid case has resulted in conditions never contemplated by Congress. Certainly Congress never dreamed that a Federal court sitting in southern Georgia would be applying rules of evidence under the common law of 1789 and another such court sitting a few miles away in northern Florida would be applying entirely different rules prescribed by a territorial legislature at the time of Florida's admission to the Union years later than 1789. It is of course problematical whether the first Con-

greses had in mind the extension of the territory of the United States beyond the confines of the then thirteen States and their possessions. Surely Congress did not intend that Federal court sitting in North Carolina would permit a person convicted of infamous crime in South Carolina to be sworn as a witness but deny such privilege to a person convicted of the same crime in the courts of North Carolina. Surely Congress did not intend that a Federal court sitting in Philadelphia would hold that a convict under the laws of Pennsylvania was competent as a witness but a convict under the laws of the United States enforced by its courts in Pennsylvania was not competent. And finally, surely Congress did not intend by any rule that it established to say that felons and convicted perjurers were to be competent witnesses in the courts of the Government, but such courts would not hear a wife on behalf of her husband. The history of judicial decision on the subject shows clearly that in the Reid case the court must have misinterpreted the purpose of Congress in adopting the Judiciary Act of 1789 insofar as rules of evidence in criminal cases are concerned.

If the Reid case was correctly decided, then by the adoption of the Judiciary Act of 1789 Congress did a most remarkably illogical thing. It was confronted with the task of prescribing rules of evidence for the Federal courts then being created. It realized the difficulty of covering the general field of evidence by legislative action. There was ready at hand the rules of evidence at common law then prevailing in all of the States of the Union without substantial difference. It was the logical thing to rely upon the common-law rules of evidence as the law of the Federal courts. But it must be remembered that these very same rules of evidence were not the result of legislative fiat. They had been brought into existence and into their then satisfactory condition by the courts of England

and America. If they commended themselves to Congress as being sound, this was a tribute to the judiciary responsible for their creation and development. Congress must have known that these rules had not remained static, but that under the wise decisions of the courts had grown and developed; had been modified to meet changing conditions; had adapted themselves to progress and enlightenment. The flexibility of the common law was then as it had been; is now, and always will be, a characteristic of that system which constitutes one of its chief charms and endears it to the English-speaking people. It had life and growth within it and of itself. It did not always require legislative action as a stimulus to progress or change. Yet under the doctrine of the Reid case we are asked to believe that it was the purpose of Congress to take this living, growing, changing body of the common law and hand it to the newly-created Federal courts with the proviso, however, that all life and growth and change by judicial care must stop forthwith and henceforth it must become a lifeless, changeless, dwarfed and stunted system. The new Federal judges could not be trusted to carry on the work of their illustrious judicial predecessors who had made available to Congress the system it chose to establish. The common law was to be availed of but it must cease to be the common law because it was denied the power or the right to exist as a live growing thing and if denied such power and right it must of necessity die. We insist that the Congress had no such illogical purpose. It did intend to adopt the rules of evidence as they then existed at common law, but it expected those rules to live and be adapted to changed conditions, and modern and enlightened thought in the discretion of the courts charged with the responsibility of enforcing them just as had been the case in our courts since the time "whence the memory of man runneth not to the contrary." It expected the Federal judiciary to be

primarily responsible for the life and progress of such rules subject, of course, to the superior will of the legislative branch of the Government when it chose to exercise that will. This is logical construction of the Act of 1789 and the legislative intent with reference thereto. The construction of the Reid case is an illogical one. Our construction would produce uniformity instead of the diversity which permits a woman to testify for her husband in the State of Washington but denies her that privilege in Pennsylvania. Moreover such a construction serves to make possible a fair, intelligent and proper administration of the law, which result certainly has not been attained by adhering to the Reid case.

We ask the Court to consider anew the Judiciary Act of 1789 and the legislative purpose behind it "in the light of general authority and sound reason," taking into consideration "the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons * * * rather than by rejecting witnesses as incompetent," and with due regard to these enlightened and modern views which "proceed upon sound principle." We ask the Court to now determine that the Act of 1789 was not intended by Congress to deny to husband and wife privileges accorded to felons, and we are confident that this Court not only has the power to so declare, but that it has the right so to do without exceeding recognized and accepted principles of judicial authority.

Point B.

Evidence of statements made by an alleged co-conspirator to a third party are not admissible unless made during the existence of the conspiracy and in furtherance of it.

The witness Buckner was permitted to testify to a conversation with the witness Martin prior to the formation

of the alleged conspiracy and not in furtherance of same (R. 8, 24). It was manifestly prejudicial.

In the first trial of this cause in the circuit court of appeals, the court, in its opinion, said:

> "No citation of authority is necessary to sustain the proposition that the acts and declarations of a co-conspirator made in furtherance of the conspiracy and during its continuance are binding upon all the conspirators." *Dowdy & Funk* v. *United States* (C. C. A., Fourth Circuit, Jan. 14, 1931), 46 Fed. (2d) 417, 424.

We feel that it is equally certain that acts and declarations made either before the conspiracy or after it is concluded and not in furtherance of same are inadmissible. That the conversation complained of occurred prior to the formation of the conspiracy, we refer to *Dowdy & Funk* v. *United States, supra,* at page 422.

As to the question of whether Buckner's evidence is admissible to corroborate Martin, we also rely upon the case of *Dowdy & Funk* v. *United States, supra.* Discussing evidence of a similar character, the court lays down certain conditions which should govern its introduction and adds:

> "And the jury should be carefully cautioned that the evidence is to be considered only as affecting the credibility of the witness; and it should never be admitted as substantive or independent supporting testimony. 40 Cyc. 2789, text, notes, and cases cited; *Di Carlo* v. *U. S.* (C. C. A., 2d) 6 F. (2d) 364; *Boykin* v. *U. S.* (C. C. A., 5th), 11 F. (2d) 484, 486.
>
> "See also *Wigmore Ev.*, §§ 1122-1129, where the whole subject is fully discussed.
>
> "Compare remarks of Mr. Justice Story, argumendo, in *Ellicott* v. *Pearl,* 10 Pet. 412, 439, 9 L. Ed. 475.
>
> "In our opinion, in admitting this class of evidence, the court should be extremely guarded and admit it only subject to the proper restrictions and conditions

prescribed; for otherwise a designing witness might easily prepare the foundation for corroborating his testimony in this manner, and impose upon the court and jury and bring about a miscarriage of justice." Page 424.

Later on the same page the opinion points out that the trial court cautioned the jury that they were to receive this evidence merely in corroboration and not as substantial evidence, and therefore it was held that there was no error in its admission. The converse of this is unquestionably true, that had the court not so cautioned the jury it would have been error to have received the evidence. The record of the present case fails absolutely to show any such caution to the jury. It is our contention that under the rule established by the Circuit Court of Appeals for the Fourth Circuit in this very case the evidence was improperly admitted and was prejudicial.

POINT C.

If an indictment describes a conspiracy by naming the time of its formation, the parties thereto as well as the method by which it was to be effected, proof of a conspiracy formed at a different time, with different parties and for a different purpose, will not support such an indictment. In such case there is a fatal variance between the allegations and proof and a failure to direct a verdict for the defendant upon proper motion is a denial of the defendant's constitutional rights under the 5th and 6th Amendments to the Constitution of the United States.

In the present case the indictment charges (*a*) the formation of a conspiracy on or about July 5, 1928, (*b*) by the defendant and Dowdy and Martin, (*c*) for the purpose of violating the National Prohibition Act, (*d*) the defendant to aid and abet the other conspirators in the manufacture and

transportation, etc., of ardent spirits, (*e*) by using his official position to protect them from detection and arrest (R. 2-3).

The evidence of the Government's witness Martin (R. 7-12) shows that the defendant, if guilty of anything, was guilty of blackmail and extortion. If there was any conspiracy it was formed subsequent to September 28, 1928 (R. 9). Also see *Dowdy & Funk* v. *United States* (C. C. A., Fourth Circuit, Jan. 14, 1931), 46 Fed. (2d) 417, 421. Dowdy was not a party to any such agreement. For this reason the circuit court of appeals held in the last referred to case that the trial court should have directed a verdict for Dowdy on the first trial. On the second trial, which is here under review, there was no evidence connecting Dowdy with any conspiracy. The petitioner Funk never had any agreement to aid and abet in the manufacture and transportation of liquor or to use his position to protect anyone from detection and arrest.

The testimony of Martin (R. 7-12), if it shows anything, shows that Funk and himself extorted money from persons who had been theretofore detected as violators of the law upon representations that they would cause pending prosecutions to be abandoned. The only possible exception is the so-called Burlington raid (R. 10-11).

> "In determining whether a variance is material, the question to be decided is, does the indictment so far fully and correctly inform the defendant of the criminal act with which he is charged that; taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense." *Underhill's Criminal Evidence* (3d Ed.), Sec. 80, p. 75.
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> "The allegations and proofs must correspond in a criminal case, and proofs without allegations are as

ineffectual as allegations without proofs." *Rabens* v. *U. S.*, 146 F. 978, 77 C. C. A. 224 (Fourth Circuit).

"To try a person for a different offense than the one charged in the indictment or information would seem on principle to be in violation of the Fifth and Sixth Amendments being intended to afford the defendant opportunity to meet the charges against him and to apprise him of the nature of the accusation which he will be called upon to meet at the trial." *Zoliné's Fed. Crim. Law and Proc.*, Vol. 1, Sec. 415, pps. 345-346.

It is submitted that while the indictment in the case may have gone more into detail than was necessary, yet if the Government chose to describe the conspiracy charged against the defendant in detail it was incumbent on it to prove the conspiracy as charged. It failed to do so. The result was to affirmatively mislead the defendant as to the nature and character of the charge he was called upon to meet. This constitutes a fatal variance.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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